RECEIVED
AND
FILED

FILED
DEC 16 2011
OFFICE OF THE CLERK

Nos. 10-1491 and 11-88

In The Supreme Court of the United States

ESTHER KIOBEL, et al.,

Petitioners,

v.

ROYAL DUTCH PETROLEUM CO., et al.,

Respondents.

ASID MOHAMAD, et al.,

Petitioners,

v.

PALESTINIAN AUTHORITY, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Second And District Of Columbia Circuits

BRIEF OF YALE LAW SCHOOL CENTER FOR GLOBAL LEGAL CHALLENGES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

JEFFREY A. MEYER
127 Wall Street
New Haven, CT 06511
(203) 436-3918

OONA A. HATHAWAY
Counsel of Record
127 Wall Street
New Haven, CT 06511
(203) 436-8969
oona.hathaway@yale.edu

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE PROHIBITION OF GENOCIDE IS A SPECIFIC, UNIVERSAL, AND OBLIGATORY INTERNATIONAL LAW NORM THAT EXTENDS TO CORPORATIONS.... 7

A. The Genocide Prohibition Is A Specific, Universal, And Obligatory Norm 7

B. The Genocide Prohibition Extends To Corporations 9

II. THE PROHIBITION OF CRIMES AGAINST HUMANITY IS A SPECIFIC, UNIVERSAL, AND OBLIGATORY INTERNATIONAL LAW NORM THAT EXTENDS TO CORPORATIONS 11

A. The Crimes Against Humanity Prohibition Is A Specific, Universal, And Obligatory Norm..... 11

B. The Crimes Against Humanity Prohibition Extends To Corporations..... 13

III. THE PROHIBITION OF TORTURE IS A SPECIFIC, UNIVERSAL, AND OBLIGATORY INTERNATIONAL LAW NORM THAT EXTENDS TO CORPORATIONS.... 15

A. The Torture Prohibition Is A Specific, Universal, And Obligatory Norm 15

TABLE OF CONTENTS – Continued

Page

B. The Torture Prohibition Extends To Corporations 17

IV. THE PROHIBITION OF EXTRAJUDICIAL KILLING IS A SPECIFIC, UNIVERSAL, AND OBLIGATORY INTERNATIONAL LAW NORM THAT EXTENDS TO CORPORATIONS 20

A. The Extrajudicial Killing Prohibition Is A Specific, Universal, And Obligatory Norm 20

B. The Extrajudicial Killing Prohibition Extends To Corporations 22

V. THE PROHIBITION OF WAR CRIMES IS A SPECIFIC, UNIVERSAL, AND OBLIGATORY INTERNATIONAL LAW NORM THAT EXTENDS TO CORPORATIONS 25

A. The War Crimes Prohibition Is A Specific, Universal, And Obligatory Norm 25

B. The War Crimes Prohibition Extends To Corporations 26

VI. THE PROHIBITION OF SLAVERY IS A SPECIFIC, UNIVERSAL, AND OBLIGATORY INTERNATIONAL LAW NORM THAT EXTENDS TO CORPORATIONS.... 29

A. The Slavery Prohibition Is A Specific, Universal, And Obligatory Norm 29

B. The Slavery Prohibition Extends To Corporations 31

TABLE OF CONTENTS – Continued

Page

VII. THE PROHIBITION OF PIRACY IS A SPECIFIC, UNIVERSAL, AND OBLIGATORY INTERNATIONAL LAW NORM THAT EXTENDS TO CORPORATIONS 34

A. The Piracy Prohibition Is A Specific, Universal, And Obligatory Norm 34

B. The Piracy Prohibition Extends To Corporations 36

CONCLUSION 38

TABLE OF AUTHORITIES

Page

CASES

Ali Shafi v. *Palestinian Auth.*, 642 F.3d 1088 (D.C. Cir. 2011) 35, 36

Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. *Serb. & Montenegro)*, 1993 I.C.J. 3 (Apr. 8) 10

Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. *Serb. & Montenegro)*, 2007 I.C.J. 43 (Feb. 26) 7, 9

Aziz v. *Alcolac, Inc.*, 658 F.3d 388 (4th Cir. 2011) 2

Cabello v. *Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005) 21

Case of the "Mapiripán Massacre" v. *Colombia*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134 (Sept. 15, 2005) 23

Comm. of U.S. Citizens Living in Nicar. v. *Reagan*, 859 F.2d 929 (D.C. Cir. 1988) 30

Doe v. *Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011) 2, 4, 21

Filartiga v. *Pena Irala*, 630 F.2d 876 (2d Cir. 1980) 17

Finucane v. *United Kingdom*, 2003-VIII Eur. Ct. H.R. 24

Flores v. *Southern Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003) 12

TABLE OF AUTHORITIES – Continued

Page

Kadic v. *Karadzic*, 70 F.3d 232 (2d Cir. 1995).....*passim*

Kiobel v. *Royal Dutch Petroleum*, 621 F.3d 111 (2d Cir. 2010).....*passim*

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8).....25

Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. *U.S.)*, Judgment, 1986 I.C.J. 14 (June 27).....25

Prosecutor v. *Akayesu*, Case No. ICTR 96-4-T, Judgment (Sept. 2, 1998).....14

Prosecutor v. *Blagojevic*, Case No. IT-02-60-A, Judgment (ICTY May 9, 2007).....8

Prosecutor v. *Deronjic*, Case No. IT-02-61-A, Judgment (ICTY July 20, 2005).....11

Prosecutor v. *Kayishema*, Case No. ICTR 95-1-T, Judgment (May 21, 1999).....24

Prosecutor v. *Kunarac*, Case No. IT-96-23-A, Judgment (ICTY June 12, 2002).....11, 14

Prosecutor v. *Kunarac*, Case No. IT-96-23-T, Trial Judgment (ICTY Feb. 22, 2001).....16

Prosecutor v. *Nahimana*, Case No. ICTR 99-52-T, Judgment (Dec. 3, 2003).....10

Prosecutor v. *Rutaganda*, Case No. ICTR IT-96-3-T, Judgment (Dec. 6, 1999).....8

Prosecutor v. *Tadic*, Case No. IT-94-1-T, Judgment (ICTY May 7, 1997).....*passim*

Quinn v. *Robinson*, 783 F.2d 776 (9th Cir. 1986).....12

TABLE OF AUTHORITIES – Continued

Page

Sarei v. *Rio Tinto, PLC*, Nos. 02-56256, 02-56390, 09-56381, 2011 WL 5041927 (9th Cir. Oct. 25, 2011) (en banc) ..... *passim*

Siderman de Blake v. *Argentina*, 965 F.2d 699 (9th Cir. 1992) 17

Sinaltrainal v. *Coca-Cola, Inc.*, 578 F.3d 1252 (11th Cir. 2009) 27

Sosa v. *Alvarez-Machain*, 542 U.S. 692 (2004) ..... *passim*

Tel-Oren v. *Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) 21

United States v. *Krauch (Farben Case)*, 8 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10* (1981) ..... *passim*

United States v. *Krupp (Krupp Case)*, 9 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10* (1950) 29, 33

United States v. *Smith*, 18 U.S. (5 Wheat.) 153 (1820) 35, 36

STATUTES

Alien Tort Statute, 28 U.S.C. § 1350 ..... *passim*

Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note 2, 3, 7, 38

TABLE OF AUTHORITIES – Continued

Page

TREATIES

African Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 217 .....16, 20

American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123.....16, 20

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85 .....*passim*

Convention on the Non-Applicability of Statutory Limits to War Crimes and Crimes Against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73.....12

Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (1949).....7, 9

Council of Europe Convention on Action Against Trafficking in Human Beings, May 16, 2005, C.E.T.S. 197 32

European Convention for the Protection of Human Rights and Fundamental Freedoms Nov. 4, 1950, 213 U.N.T.S. 221 .....16, 20

Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 20

Inter-American Convention to Prevent and Punish Torture, adopted Dec. 9, 1985, O.A.S. T.S. No. 67.....16

TABLE OF AUTHORITIES – Continued

Page

International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 ..... *passim*

Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 ..... *passim*

Slavery Convention, Sept. 25, 1926, 46 Stat. 483, 60 L.N.T.S. 254 30

Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, *done* Sept. 7, 1956, 18 U.S.T. 3201, 226 U.N.T.S. 3 30

United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 34

U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Nov. 15, 2000, 2237 U.N.T.S. 319 30

MISCELLANEOUS

4 William Blackstone, *Commentaries* 36

ASEAN Declaration Against Trafficking in Persons Particularly Women and Children, Nov. 29, 2004 31

Committee Against Torture, General Comment No. 2, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008) 18, 19

Control Council Law No. 9, *Providing for the Seizure of Property Owned by I.G. Farbenindustrie and the Control Thereof*, Nov. 30, 1945 33

TABLE OF AUTHORITIES – Continued

Page

Control Council Law No. 10, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, Dec. 20, 1945....*passim*

Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452 (XXX), annex, U.N. GAOR, 30th Sess., Supp. No. 34, U.N. Doc. A/10034 (Dec. 9, 1975) 16

General Order No. 3 (Pursuant to Military Government Law No. 52 – Blocking and Control of Property): Firma Friedrich Krupp, *Military Government Gazette, Germany, British Zone of Control*, No. 5 (1945).....33

International Law Association, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses* (2000).....35

M. Cherif Bassiouni, *International Crimes*: Jus Cogens *and* Obligatio Erga Omnes, 59 Law & Contemp. Probs. 63, 68 (1996).....34

Nuremburg Charter, Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 282 .....12, 13, 27

Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, E.S.C. Res. 1989/65, U.N. Doc. E/RES/1989/65 (May 24, 1989).....22

Rep. of the Monitoring Group on Somalia Pursuant to Security Council Resolution 1853 (2008), U.N. Doc. S/2010/91 (Mar. 10, 2010).....37

TABLE OF AUTHORITIES – Continued

Page

Restatement (Third) of Foreign Relations Law (1987) ..... *passim*

Status of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, United Nations Treaty Collection (Dec. 13, 2011), http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en 16, 34

Status of the Convention on the Prevention and Punishment of the Crime of Genocide, United Nations Treaty Collection (Dec. 13, 2011), http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=IV-1&chapter=4&lang=en 7

Status of the United Nations Convention on the Law of the Sea, United Nations Treaty Collection (Dec. 13, 2011), http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en 34

Statute of the International Criminal Tribunal for Rwanda, Nov. 8, 1994, 33 I.L.M. 1598 ..... *passim*

Statute of the International Criminal Tribunal for the Former Yugoslavia, May 25, 1993, 32 I.L.M. 1192 ..... *passim*

Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

U.N. Secretary-General, *Rep. of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. Doc. S/25704 (May 3, 1993) 5

U.N. Special Rapporteur on Extrajudicial Summary or Arbitrary Executions, *Civil and Political Rights, Including Questions of Disappearances and Summary Executions*, Comm'n on Human Rights, U.N. Doc. E/CN.4/2005/7 (Dec. 22, 2004).....23

U.N. Special Rapporteur on Extrajudicial Summary or Arbitrary Executions, *Communications to and from Governments*, Human Rights Council, 308-310, U.N. Doc. A/HRC/8/3/Add.1 (May 30, 2008).....24

U.N. Special Rapporteur on Extrajudicial Summary or Arbitrary Executions, *Mission to Nigeria*, Comm'n on Human Rights, U.N. Doc. E/CN.4/2006/53/Add.4 (Jan. 7, 2006) 24

U.N. Special Rapporteur on Extrajudicial Summary or Arbitrary Executions, *Mission to the Philippines*, Human Rights Council, U.N. Doc. A/HRC/8/3/Add.2 (Apr. 16, 2008).....22

U.N. Special Rapporteur on Extrajudicial Summary or Arbitrary Executions, *Report*, Human Rights Council, U.N. Doc. A/HRC/14/24 (May 20, 2010).....22, 23

U.S. Dep't of State, *Democratic Republic of the Congo: Country Reports on Human Rights Practices* (Feb. 23, 2000).....19

TABLE OF AUTHORITIES – Continued

Page

U.S. Dep't of State, *Digest of United States Practice in International Law* (Elizabeth R. Wilcox ed., 2009) 35

U.S. Dep't of State, *Sri Lanka: Country Reports on Human Rights Practices* (Mar. 4, 2002) 19

INTEREST OF THE *AMICUS CURIAE*

The Yale Law School Center for Global Legal Challenges is an independent Center that promotes the understanding of international law, national security law, and foreign affairs law.[1] The Center aims to close the divide between the legal academy and legal practice by connecting the legal academy to U.S. government actors responsible for addressing international legal challenges. In the process, the Center aims to promote greater understanding of legal issues of global importance – encouraging the legal academy to better grasp the real legal challenges faced by U.S. government actors and encouraging those same government actors to draw upon the expertise available within the legal academy. The Center files this brief to promote accurate interpretation of international law in this case by providing the Court with an examination of prohibitory norms of international law that apply to corporations and other organizations.

---

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office. The views expressed in this brief are not necessarily those of the Yale Law School or Yale University.

SUMMARY OF ARGUMENT

Petitioners' briefs contend that there is no basis for categorically excluding corporations or other organizations as defendants under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, or the Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C. § 1350 note. The Center agrees.

We submit this brief to address a related issue: whether *specific* prohibitory norms of international law apply to corporations.[2] ATS lawsuits commonly rest upon claimed violations of prohibitory norms such as genocide, crimes against humanity, torture, extrajudicial killing, war crimes, slavery, and piracy.[3] TVPA lawsuits similarly rest upon claimed violations of the prohibitory norms of torture and extrajudicial killing.

---

[2] Throughout this brief, the arguments we make regarding corporations apply to other organizations as well, unless expressly indicated otherwise.

[3] See, *e.g.*, *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 720 (2004) (discussing claims cognizable under the ATS from its inception, including piracy); *Sarei* v. *Rio Tinto, PLC*, Nos. 02-56256, 02-56390, 09-56381, 2011 WL 5041927, at *17-20 (9th Cir. Oct. 25, 2011) (en banc) (crimes against humanity, genocide, war crimes), *petition for cert. filed*, No. 11-649 (Nov. 23, 2011); *Aziz* v. *Alcolac, Inc.*, 658 F.3d 388, 390 (4th Cir. 2011) (genocide); *Doe* v. *Exxon Mobil Corp.*, 654 F.3d 11, 16 (D.C. Cir. 2011) (crimes against humanity, extrajudicial killing, genocide, torture); *Kiobel* v. *Royal Dutch Petroleum*, 621 F.3d 111, 123 (2d Cir. 2010) (crimes against humanity, extrajudicial killing, torture), *cert. granted*, No. 10-1491 (Oct. 17, 2011); *Kadic* v. *Karadzic*, 70 F.3d 232, 236-237, 239 (2d Cir. 1995) (crimes against humanity, genocide, slavery, summary execution, torture, war crimes).

In this brief we show that each of these norms is specific, universal, and obligatory and that each of these norms extends to corporations. This specific, norm-by-norm analysis supports petitioners' arguments that corporations are not categorically excluded from liability under the ATS or the TVPA.

ARGUMENT

The norm-by-norm approach adopted in this brief follows upon this Court's observation that a consideration in determining whether an ATS case may proceed is whether "a given norm" extends "to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 732 n.20 (2004). Thus, as the en banc Ninth Circuit recently concluded, the inquiry "should consider *separately* each violation of international law alleged and which actors may violate it," *Sarei* v. *Rio Tinto, PLC*, Nos. 02-56256, 02-56390, 09-56381, 2011 WL 5041927, at *7 (9th Cir. Oct. 25, 2011) (en banc) (emphasis added), because "the handful of international law violations that may give rise to an ATS claim are often restricted by the identity of the perpetrator, the identity of the victim, or the locus of events." *Id.* at *43 (McKeown, J., concurring).

Some international law norms apply to the conduct of all actors. By contrast, some norms do not – for example, they may apply only to State actors or

those who act in concert with the State. "The particularity of each norm highlights the importance of conducting a norm-specific inquiry as to each alleged violation of international law" to determine if a claim may be maintained under the ATS. *Id.* at *44.

At the outset we note a critical difference between the *applicability* of an international law norm and whether *liability* should be imposed upon a party who violates an applicable norm. The *Kiobel* majority wrongly elided this distinction, conflating the absence of international law precedent holding corporations criminally liable with a conclusion that major prohibitory norms of international law have no application to what corporations do.[4]

Liability for violating a norm only exists where a court has jurisdiction over an actor to whom that norm applies. The ATS is a jurisdiction-granting statute.[5] *Sosa*, 542 U.S. at 712. In this sense, it serves

---

[4] *Cf. Kiobel*, 621 F.3d at 152 (Leval, J., concurring only in judgment); *Exxon Mobil*, 654 F.3d at 50 (noting that "[t]he Second Circuit's approach overlooks the key distinction between norms of conduct and remedies").

[5] The ATS grants jurisdiction over a civil action by an alien for violations of certain well-established norms of international law. Given this jurisdictional grant, "international law extends the scope of liability to the perpetrator being sued," *Sosa*, 542 U.S. at 732 n.20, only if the international law norm extends to that perpetrator. This reading is supported by this Court's citation of two courts' discussions of the applicability of certain norms to the conduct of private actors. *Ibid.* (citing *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 791-795 (D.C. Cir. 1984) (Edwards, J., concurring) for the proposition that there was

(Continued on following page)

a similar role to the Rome Statute of the International Criminal Court (ICC), July 17, 1998, 2187 U.N.T.S. 90 (Rome Statute), or the Statutes of the International Criminal Tribunal for the Former Yugoslavia, May 25, 1993, 32 I.L.M. 1192 (ICTY Statute), and the International Criminal Tribunal for Rwanda, Nov. 8, 1994, 33 I.L.M. 1598 (ICTR Statute). These charters do not create substantive law; instead, they create jurisdiction for the relevant tribunals to try those who are alleged to have violated existing norms of international law.[6] Corporations are not liable before these tribunals because their charters extend jurisdiction only to "natural persons."[7]

The ATS also grants limited jurisdiction: it allows for a "civil action" filed by an "alien," "for a tort only." 28 U.S.C. § 1350. Moreover, it relies on international law to determine whether the tort is "committed in violation of the law of nations * * *." *Ibid.* The ATS,

---

"insufficient consensus in 1984 that torture by private actors violates international law" and citing *Kadic*, 70 F.3d at 242, for the proposition that there was "sufficient consensus in 1995 that genocide by private actors violates international law"); see also *Kadic* 70 F.3d at 242 ("The *applicability* of this norm to private individuals is also confirmed by the Genocide Convention Implementation Act * * *.") (emphasis added).

[6] See, *e.g.*, U.N. Secretary-General, *Rep. of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, ¶ 29, U.N. Doc. S/25704 (May 3, 1993); *Prosecutor* v. *Tadic*, Case No. IT-94-1-T, Judgment, ¶¶ 662, 669 (ICTY May 7, 1998); Rome Statute art. 5, ¶ 1.

[7] See Rome Statute art. 25(1); ICTY Statute art. 6; ICTR Statute art. 5.

however, contains no limitation on who may be sued. Accordingly, when an ATS suit is filed against a corporation, whether there is an actionable "violation of the law of nations" depends in part on whether the particular international law norm at issue is capable of being violated by a corporation.

This brief focuses solely on the applicability of specific international law norms to corporate conduct. It does not address the separate issue of whether a corporation may be accountable not only as a principal actor but also as an aider-and-abettor, a co-conspirator, or under other forms of accessory liability. See Kiobel Pet. Br. 39, n.31 (reserving the issue of whether the ATS applies to corporate aiding-and-abetting of other actors who violate international norms). For similar reasons, this brief does not address the question of how a corporation satisfies the elements of liability – such as the state of mind element – for a particular offense.

This brief conducts a norm-by-norm analysis of seven major prohibitory norms of international law: genocide, crimes against humanity, torture, extra-judicial killing, war crimes, slavery, and piracy. It, first, defines the contours of these prohibitions, showing that they are sufficiently specific, universal, and obligatory to meet the requirements set out in *Sosa*, and, second, shows that the prohibitions apply to corporations.

This norm-by-norm analysis supports petitioners' broader contention that corporations are not

categorically excluded from the universe of parties who may be held liable under the ATS and the TVPA.

I. THE PROHIBITION OF GENOCIDE IS A SPECIFIC, UNIVERSAL, AND OBLIGATORY INTERNATIONAL LAW NORM THAT EXTENDS TO CORPORATIONS.

A. The Genocide Prohibition Is A Specific, Universal, And Obligatory Norm.

Genocide is defined as an act "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group." Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) art. 2, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (1949). This definition is common to all relevant international instruments, which identically limit the norm to a set of specific enumerated acts. See Rome Statute art. 6; ICTY Statute art. 4; ICTR Statute art. 2. The Genocide Convention, to which 142 states are party, including the United States, affirms that genocide is "a crime under international law." Genocide Convention art. 1; Status of the Convention on the Prevention and Punishment of the Crime of Genocide, United Nations Treaty Collection (Dec. 13, 2011), http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=IV-1&chapter=4&lang=en

The International Court of Justice (ICJ) has found genocide to be a peremptory – or *jus cogens* – norm from which no derogation is permitted. *Application of*

Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro) (*Bosnian Genocide*), 2007 I.C.J. 43, ¶ 161 (Feb. 26). Since Nuremberg, almost every international criminal tribunal has prosecuted individuals for genocide. See, *e.g.*, *Prosecutor* v. *Blagojevic*, Case No. IT-02-60-A, Judgment (ICTY May 9, 2007); *Prosecutor* v. *Rutaganda*, Case No. ICTR IT-96-3-T, Judgment (Dec. 6, 1999).

Similarly, U.S. courts have consistently understood genocide to be a violation of customary international law. This Court in *Sosa* noted approvingly the Second Circuit's view that there is "sufficient consensus * * * that genocide by private actors violates international law." *Sosa*, 542 U.S. at 732 n.20 (citing *Kadic* v. *Karadzic*, 70 F.3d 232, 239-241 (2d Cir. 1995)). Justice Breyer further noted both "substantive agreement" that genocide is "universally condemned behavior" under international law and "procedural agreement that universal jurisdiction exists to prosecute" cases of genocide wherever they may occur. *Id.* at 762 (Breyer, J., concurring in part and concurring in the judgment); see also *Sarei*, 2011 WL 5041927, at *19 (noting that "the *jus cogens* prohibition of genocide is sufficiently specific, universal, and obligatory to give rise to an ATS claim").

B. The Genocide Prohibition Extends To Corporations.

All international instruments that prohibit genocide define it according to prohibited acts, without reference to actor. See Genocide Convention art. 2; Rome Statute art. 6; ICTY Statute art. 4; ICTR Statute art. 2. The prohibition clearly applies to non-state actors. The Genocide Convention explicitly provides that "[p]ersons committing genocide * * * shall be punished, whether they are constitutionally responsible rulers, public officials or *private* individuals." Genocide Convention art. 4 (emphasis added). The Second Circuit recognizes that the prohibition "applie[s] equally to state and non-state actors," and that the Genocide Convention's implementing legislation "criminalizes acts of genocide without regard to whether the offender is acting under color of law." *Kadic*, 70 F.3d at 242.

The ICJ, the authoritative interpreter of the Genocide Convention,[8] has explained that genocide can be committed by non-state actors including private entities. In *Bosnian Genocide*, the ICJ discussed "persons *or entities* that committed the acts of genocide at Srebrenica." 2007 I.C.J. 43, ¶ 393 (emphasis added). In an earlier order, it had instructed the Yugoslav government to "ensure 'that any military,

---

[8] See Genocide Convention art. 9 ("Disputes * * * relating to the interpretation, application, or fulfilment of the present Convention * * * shall be submitted to the International Court of Justice * * *.").

paramilitary or irregular armed units * * * as well as any *organizations* and persons which may be subject to its control, direction or influence, do not commit any acts of genocide * * *.'" *Bosnian Genocide*, 1993 I.C.J. 3, ¶ 52 (Apr. 8) (emphasis added). It is therefore clear that the ICJ considers genocide committed by non-state entities a "'crime under international law.'" *Id.* ¶ 45 (quoting Genocide Convention art. 1); see also *Sarei*, 2011 WL 5041927, at *20 ("[L]oosely affiliated groups such as paramilitary units may commit genocide, particularly in light of consistent case law indicating that genocide does not require state action.").

The ICTR has explicitly extended the genocide norm to corporations. In *Prosecutor* v. *Nahimana*, Case No. ICTR 99-52-T, Judgment (Dec. 3, 2003), the Trial Chamber held that the radio station RTLM, a corporate entity, *id.* ¶ 552, incited genocide through broadcasts. *Id.* ¶¶ 949, 952-953. One company director was found guilty of genocide for "his active engagement in the management of RTLM" and "failure to take necessary and reasonable measures to prevent the killing of Tutsi civilians instigated by RTLM." *Id.* ¶ 973. Another director was found guilty of genocide because he was "the founder and principal ideologist of RTLM," and he used RTLM as his "weapon of choice * * * to instigate the killing of Tutsi civilians." *Id.* ¶ 974. Although the ICTR's criminal jurisdiction extends only to individuals, the Trial Chamber made clear that a company, RTLM, violated the international norm against genocide.

In short, the prohibition against genocide extends to non-state organizations, including corporations. "Given that an amorphous group, a state, and a private individual may all violate the *jus cogens* norm prohibiting genocide, corporations likewise can commit genocide under international law because the prohibition is universal." *Sarei*, 2011 WL 5041927, at *20.

II. THE PROHIBITION OF CRIMES AGAINST HUMANITY IS A SPECIFIC, UNIVERSAL, AND OBLIGATORY INTERNATIONAL LAW NORM THAT EXTENDS TO CORPORATIONS.

A. The Crimes Against Humanity Prohibition Is A Specific, Universal, And Obligatory Norm.

International law recognizes a universal prohibition of crimes against humanity, defined as the commission of a prohibited act with knowledge that it is part of a widespread or systematic attack directed against a civilian population.[9] Prohibited acts include

---

[9] Although the "widespread or systematic attack" requirement does not appear in the ICTY Statute, it is clear in the tribunal's jurisprudence. See, *e.g.*, *Prosecutor* v. *Deronjic*, Case No. IT-02-61-A, Judgment, ¶ 109 (ICTY July 20, 2005). The Rome Statute requires a "widespread or systematic attack" and defines such an attack as involving a state or organizational policy. Rome Statute art. 7. Such a policy requirement, however, is not universally accepted. *Prosecutor* v. *Kunarac*, Case No. IT-96-23-A, Judgment, ¶ 98 (ICTY June 12, 2002) ("[N]either the attack nor the acts of the accused needs to be supported by any form of 'policy' or 'plan.'").

murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution, and other inhumane acts. See, *e.g.*, Rome Statute art. 7; ICTY Statute art. 5; ICTR Statute art. 3.

The prohibition of crimes against humanity dates from Nuremberg. Nuremburg Charter art. 6(c), Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 282. The norm has been repeatedly reaffirmed in international instruments and the charters of international tribunals. See, *e.g.*, Convention on the Non-Applicability of Statutory Limits to War Crimes and Crimes Against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73; Rome Statute art. 7; ICTY Statute art. 5; ICTR Statute art. 3; see also *Prosecutor* v. *Tadic*, Case No. IT-94-1-T ¶ 623 (ICTY May 7, 1997) (noting that the customary status of the prohibition has "not been seriously questioned" since Nuremburg).

U.S. courts have also recognized the prohibition of crimes against humanity as a universally accepted norm. See, *e.g.*, *Flores* v. *Southern Peru Copper Corp.*, 414 F.3d 233, 244 n.18 (2d Cir. 2003) (recognizing "[c]ustomary international law rules proscribing crimes against humanity"); *Quinn* v. *Robinson*, 783 F.2d 776, 799 (9th Cir. 1986) ("Crimes against humanity, such as genocide, violate international law * * *."). Moreover, Justice Breyer placed crimes against humanity within the subset of norms on which there is "substantive agreement as to certain universally condemned behavior," and "procedural agreement that universal jurisdiction exists to prosecute * * * that

behavior." *Sosa*, 542 U.S. at 762 (Breyer, J., concurring in part and concurring in the judgment).

B. The Crimes Against Humanity Prohibition Extends To Corporations.

Corporations are capable of committing crimes against humanity. The customary international law norm depends on the act itself, rather than the identity of the perpetrator. The Rome Statute makes clear that a "'crime against humanity' means *any* of the [enumerated] *acts*" and makes no distinction as to the actor responsible. Rome Statute art. 7(1) (emphasis added). Both the ICTY and the ICTR Statutes refer to "the following crimes [when directed against] any civilian population," and do not limit the definition of the crime to a particular actor. ICTY Statute art. 5; ICTR Statute art. 3.

International criminal jurisprudence dating from Nuremberg demonstrates that the prohibition of crimes against humanity includes groups and organizations. The Nuremberg Charter states that the "Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a *criminal organization*." Nuremburg Charter art. 9 (emphasis added); see also Control Council Law No. 10 art. 2(2), *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, Dec. 20, 1945, *reprinted in* 1 *Enactments and Approved Papers of the Control Council and Coordinating*

Committee 306 (1945) ("Any person * * * is deemed to have committed a crime as defined in paragraph 1 of this Article [including crimes against humanity], if he was * * * a member of any organization or group connected with the commission of any such crime.").[10]

Modern jurisprudence further shows that non-state groups and organizations can violate the prohibition of crimes against humanity. The ICTY has held that crimes against humanity can be committed by groups and organizations. *Tadic*, ¶ 654 ("[C]rimes against humanity can be committed * * * by a terrorist group or organization"). The crimes must be part of a widespread or systematic attack; however, "only the attack, not the individual acts * * * must be widespread or systematic," and the attack need not be "adopted formally as the policy of a state." *Prosecutor* v. *Kunarac*, Case No. IT-96-23-A, Judgment, ¶ 96 (ICTY June 12, 2002); see also *Prosecutor* v. *Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶ 580 (Sept. 2, 1998). The requirement may thus be met where a non-state entity acts as part of an attack by an actor exercising territorial control. *Tadic*, ¶ 654.

The post-World War II tribunals demonstrate that the norm extends to corporations in particular. The Nuremberg tribunals recognized that corporate conduct could violate the prohibition on crimes against

---

[10] The Allied Control Council was the governing body of the military occupation of Germany after World War II ended in Europe.

humanity. Twenty-three executives at I.G. Farben, a corporation responsible for the production of Zyklon B gas used at Auschwitz, were charged for "collective[ ]" actions utilizing the "instrumentality" of Farben. *United States* v. *Krauch (Farben Case)*, 8 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, at 1166 (1981).

In short, the crimes against humanity prohibition extends to non-state groups and organizations. Corporations are therefore capable of violating the crimes against humanity prohibition.

III. THE PROHIBITION OF TORTURE IS A SPECIFIC, UNIVERSAL, AND OBLIGATORY INTERNATIONAL LAW NORM THAT EXTENDS TO CORPORATIONS.

A. The Torture Prohibition Is A Specific, Universal, And Obligatory Norm.

Torture is generally defined as the infliction of physical or mental pain or suffering, for a prohibited purpose (such as obtaining information or a confession), "by or at the instigation of or with the consent or acquiescence of" a state actor. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) art. 1, ¶ 1, Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85.

Torture is universally prohibited by customary international law. The Universal Declaration of Human Rights (UDHR) mandates that "[n]o one shall be

subjected to torture." UDHR art. 5, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). Similarly, the International Covenant on Civil and Political Rights (ICCPR) states, "No one shall be subjected to torture * * *." ICCPR art. 7, Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171. Confirming the customary international norm against torture, 149 states, including the United States, have joined the CAT. Status of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, United Nations Treaty Collection (Dec. 13, 2011), http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en

The UDHR, the ICCPR, and the CAT are but a few of numerous international instruments that prohibit torture.[11] In short, "[t]orture is prohibited under both conventional and customary international law," and "can be said to constitute a norm of *jus cogens*." *Prosecutor* v. *Kunarac*, Case No. IT-96-23-T, Trial Judgment, ¶ 466 (ICTY Feb. 22, 2001) (internal footnotes omitted).

---

[11] See Inter-American Convention to Prevent and Punish Torture, adopted Dec. 9, 1985, O.A.S. T.S. No. 67; African Charter on Human and Peoples' Rights art. 5, June 27, 1981, 1520 U.N.T.S. 217; Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452 (XXX), annex, U.N. GAOR, 30th Sess., Supp. No. 34, U.N. Doc. A/10034, at 91 (Dec. 9, 1975); American Convention on Human Rights art. 5, § 2, Nov. 22, 1969, 1144 U.N.T.S. 123; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 221.

U.S. courts and authorities also recognize that the prohibition against torture is universal, specific, and obligatory. See, *e.g.*, *Siderman de Blake* v. *Argentina*, 965 F.2d 699, 717 (9th Cir. 1992) (indicating that freedom from "official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*"); *Filartiga* v. *Pena Irala*, 630 F.2d 876, 883 (2d Cir. 1980) ("[W]e have little difficulty discerning [torture's] universal renunciation in the modern usage and practice of nations."); see also *Sosa*, 542 U.S. at 762 (Breyer, J., concurring in part and concurring in the judgment) (identifying torture among the subset of "universally condemned behavior" and noting the procedural agreement that universal jurisdiction exists); Restatement (Third) of Foreign Relations Law § 702 (1987) (Restatement) (listing the torture prohibition as part of the "Customary International Law of Human Rights").

B. The Torture Prohibition Extends To Corporations.

The international norm against torture applies to all actors equally, provided a State official at least acquiesces or the torture occurs under color of law. CAT art. 1; *Kadic*, 70 F.3d at 243-245. That the torture prohibition extends not just to direct State action but also to action to which the State has acquiesced indicates that non-state actors can violate the norm. Indeed, the UDHR categorically prohibits torture and provides that "[n]othing in the Declaration may be interpreted as implying for any State, group or person

any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein." UDHR art. 30.

The CAT requires that the pain or suffering must be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity," but it imposes no limitation on who can commit such acts. CAT art. 1. The Convention requires that each member state enact criminal penalties for torture and that criminal penalties "shall apply * * * to an act by *any* person which constitutes complicity or participation in torture." *Id.* art. 4 (emphasis added). Moreover, none of the many other international treaties that prohibit torture exclude non-state actors. See *supra* note 11 (citing international instruments prohibiting torture).

The authoritative adjudicator and interpreter of the CAT, the United Nations Committee Against Torture, expressly acknowledges that non-state actors are capable of committing torture in violation of international law. The Committee explains that State failure to provide remedies to torture victims "enables non-State actors to commit acts impermissible under the Convention with impunity." Committee Against Torture, General Comment No. 2 ¶ 18, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008). It further discusses "acts of torture * * * committed by non-State officials or private actors" and argues that "the State bears responsibility" where it fails "to exercise due diligence to prevent, investigate, prosecute, and punish such

non-State officials or private actors" for violating the torture prohibition. *Id.* ¶ 18.

The torture norm applies to non-state groups and institutions. The UDHR denies that "any State, *group* or person" can impair "the rights and freedoms set forth herein," UDHR art. 30 (emphasis added), including the freedom that "[n]o one shall be subjected to torture." *Id.* art. 5. The Committee Against Torture interprets the norm to bind institutions, including private ones. See, *e.g.*, General Comment No. 2 ¶ 15.

Furthermore, the U.S. State Department has routinely acknowledged that non-state groups and organizations have engaged in torture. See, *e.g.*, U.S. Dep't of State, *Democratic Republic of the Congo: Country Reports on Human Rights Practices* (Feb. 23, 2000) (citing credible reports that "Mai Mai groups fighting on the side of the Government committed * * * torture * * * of civilians"); U.S. Dep't of State, *Sri Lanka: Country Reports on Human Rights Practices* (Mar. 4, 2002) ("[T]wo former Tamil terrorist organizations aligned with the former PA Government * * * have been implicated in cases involving extrajudicial killing [and] torture.").

In short, the prohibition against torture extends to non-state individuals, organizations, and groups, provided that the pain or suffering is inflicted with the acquiescence of a State actor or under color of law. Thus, corporations are capable of violating the prohibition against torture.

IV. THE PROHIBITION OF EXTRAJUDICIAL KILLING IS A SPECIFIC, UNIVERSAL, AND OBLIGATORY INTERNATIONAL LAW NORM THAT EXTENDS TO CORPORATIONS.

A. The Extrajudicial Killing Prohibition Is A Specific, Universal, And Obligatory Norm.

Extrajudicial killing is the arbitrary deprivation of life, committed by or in concert with the State or under color of law. It includes all deliberate killing by the State or persons acting with its authority, consent, or acquiescence, except when carried out as lawful punishment pursuant to due process or as necessary in exigent circumstances. See Restatement § 702 cmt. f.

The prohibition against extrajudicial killing is a universal and obligatory norm of international law. The UDHR establishes the "right to life." UDHR art. 3. Its corollary – the right to freedom from arbitrary deprivation of life – is reaffirmed in the ICCPR, as well as in numerous regional human rights instruments. ICCPR art. 6(1); African Charter on Human and Peoples' Rights art. 4, June 27, 1981, 1520 U.N.T.S. 217; American Convention on Human Rights art. 4, Nov. 22, 1969, 1144 U.N.T.S. 123; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Nov. 4, 1950, 213 U.N.T.S. 221. In addition, international humanitarian law prohibits arbitrary execution of protected persons during non-international armed conflicts. Geneva

Convention Relative to the Treatment of Prisoners of War art. 3 (Common Article 3), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

International law specifically provides the minimum judicial protections necessary for an execution to be non-arbitrary. Those protections include the right to a "fair and public hearing by a competent, independent and impartial tribunal established by law," as well as the presumption of innocence, the right to be present at trial, the right to counsel, the right to appellate review, and the privilege against self-incrimination. ICCPR art. 14. These core provisions constitute the "judicial guarantees which are recognized as indispensable by civilized peoples." Common Article 3.

U.S. courts treat the prohibition against extrajudicial killing (or summary execution) as firmly established in the law of nations. See, *e.g.*, *Doe* v. *Exxon Mobil Corp.*, 654 F.3d 11, 17 (D.C. Cir. 2011) (noting the parties' agreement that "extrajudicial killing, torture, and prolonged arbitrary detention are clearly established norms of international law"); *Cabello* v. *Fernandez-Larios*, 402 F.3d 1148, 1157-1158 (11th Cir. 2005) (noting conclusions of courts that "where a defendant has been found directly or secondarily responsible for acts of torture or extrajudicial killing, the acts are in violation of the law of nations"); *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 791 n.20 (D.C. Cir. 1984) (Edwards, J., concurring) (noting the views of commentators that "at least four acts [are]

subject to unequivocal international condemnation: torture, summary execution, genocide and slavery").

B. The Extrajudicial Killing Prohibition Extends To Corporations.

The prohibition of extrajudicial killing applies to all actors, as long as the perpetrator acts with the acquiescence of the State or under color of law. The U.N. Economic and Social Council, for example, has directed that extrajudicial killing "shall not be carried out under any circumstances including * * * *by a person acting at the instigation, or with the consent or acquiescence of*" a public official. Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, E.S.C. Res. 1989/65, U.N. Doc. E/RES/1989/65 (May 24, 1989) (emphasis added).

The U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (Special Rapporteur) has concluded that "both state and non-state actors can commit extrajudicial executions." Special Rapporteur, *Mission to the Philippines*, Human Rights Council, ¶ 5, U.N. Doc. A/HRC/8/3/Add.2 (Apr. 16, 2008). The Special Rapporteur distinguishes between isolated private killings – "a domestic crime [that] does not give rise to State responsibility" – and private killings that implicate State responsibility. Special Rapporteur, *Report*, Human Rights Council, ¶ 46(d), U.N. Doc. A/HRC/14/24 (May 20, 2010) (Rep. of the Special Rapporteur). The latter may involve "groups

which, although not government officials as such, nonetheless operate at the behest of the Government, or with its knowledge or acquiescence." Special Rapporteur, *Civil and Political Rights, Including Questions of Disappearances and Summary Executions*, Comm'n on Human Rights, ¶ 69, U.N. Doc. E/CN.4/2005/7 (Dec. 22, 2004). Hence incidents such as "killings by rebel and insurgent groups, paramilitary groups, militias, vigilantes, death squads, criminal gangs, bandits, mobs, family members and private individuals" could qualify as extrajudicial executions if committed with the knowledge or acquiescence of the State. Rep. of the Special Rapporteur, ¶ 45. In this respect, the prohibitory norm against extrajudicial killing resembles the prohibitory norm against torture. See *supra* Part III.B.

International courts confirm that non-state actors are capable of committing extrajudicial killings. For example, the Inter-American Court of Human Rights held Colombia responsible for a massacre carried out by an independent paramilitary group with the "support or tolerance" of public authorities. *Case of the "Mapiripán Massacre" v. Colombia*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶¶ 110, 123, 138 (Sept. 15, 2005). The European Court of Human Rights found the United Kingdom in breach of its duty where it failed to carry out an independent investigation into an alleged killing by an "illegal loyalist paramilitary group," explaining that the State's duty to investigate extrajudicial killings "is not confined to cases where it has been established that the killing was caused by

an agent of the State." *Finucane* v. *United Kingdom*, 2003-VIII Eur. Ct. H.R. ¶¶ 10, 84. Similarly, in *Prosecutor* v. *Kayishema*, the ICTR applied Amnesty International's definition of extrajudicial killing as "unlawful and deliberate killings carried out with the order of a Government *or with its complicity or acquiescence*." Case No. ICTR 95-1-T, Judgment, ¶ 140 (May 21, 1999) (emphasis added). While that case involved allegations of crimes against humanity, the court's holding extended to unlawful killings – *i.e.*, extrajudicial killings. Each of these courts recognized that the prohibition against extrajudicial killing can apply to the conduct of non-state actors.

The norm against extrajudicial killing extends to all non-state actors, including corporations. The Special Rapporteur included corporate activity among examples of the conduct of non-state actors implicated in extrajudicial killings. See, *e.g.*, Special Rapporteur, *Mission to Nigeria*, Comm'n on Human Rights, ¶ 86, U.N. Doc. E/CN.4/2006/53/Add.4 (Jan. 7, 2006) ("Oil companies have long been accused of complicity in actions involving human rights violations including extrajudicial executions."); Special Rapporteur, *Communications to and from Governments*, Human Rights Council, 308-310, U.N. Doc. A/HRC/8/3/Add.1 (May 30, 2008) (reporting shooting of local residents by private security forces at a gold mine and Papua New Guinea's subsequent failure to investigate). These reports support the conclusion that corporations, like other non-state actors, are capable of violating the international law prohibition on extrajudicial killing.

In short, the prohibition of extrajudicial killing extends to the conduct of a variety of non-state actors, provided that the conduct occurs with the acquiescence of a State actor or under color of law. Accordingly, corporations are capable of violating the prohibition against extrajudicial killing.

V. THE PROHIBITION OF WAR CRIMES IS A SPECIFIC, UNIVERSAL, AND OBLIGATORY INTERNATIONAL LAW NORM THAT EXTENDS TO CORPORATIONS.

A. The War Crimes Prohibition Is A Specific, Universal, And Obligatory Norm.

War crimes are serious violations of international humanitarian law (the law of war). The Geneva Conventions, which protect those not taking active part in hostilities against inhumane treatment, are a principal source of the law of war. More than 180 nations, including the United States, have agreed to the definition of war crimes set forth in Common Article 3 of the Geneva Conventions. See *Sarei*, 2011 WL 5041927, at *23-24. Other treaties also define specific war crimes. See, *e.g.*, Rome Statute art. 8 (consolidating war crimes as defined by prior treaties and international custom); ICTY Statute arts. 2-3; ICTR Statute art. 4.

The prohibition of war crimes is universal and obligatory. See, *e.g.*, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 I.C.J. 226, ¶¶ 79-81 (July 8); *Military and Paramilitary*

Activities in and Against Nicaragua (Nicar. v. *U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 218 (June 27); Restatement § 404.

U.S. courts have also concluded that the prohibition of war crimes is a universal, specific, and obligatory norm of customary international law. See, *e.g.*, *Sarei*, 2011 WL 5041927, at *23-24; *Kiobel* v. *Royal Dutch Petroleum*, 621 F.3d 111, 120 (2d Cir. 2010); see also *Sosa*, 542 U.S. at 762 (Breyer, J., concurring in part and concurring in the judgment) (noting war crimes as an example of "universally condemned behavior" for which "universal jurisdiction exists to prosecute").

B. The War Crimes Prohibition Extends To Corporations.

The major instruments defining war crimes describe them solely in terms of prohibited conduct, without specifying the actor. See, *e.g.*, Rome Statute art. 8; ICTY Statute art. 3; ICTR Statute art. 4; Control Council Law No. 10 art. 2.

Non-state actors are capable of engaging in war crimes. Common Article 3 of the Geneva Conventions necessarily binds non-state actors because it governs *non*-international armed conflicts, which presupposes at least one actor that is *not* a state. Common Article 3.

U.S. courts have recognized that non-state actors are capable of committing war crimes. *Sarei*, 2011 WL

5041927, at *24 ("Because parties to a conflict not of an international character by definition must include at least one non-state actor, entity, or group, Common Article III cannot reasonably be interpreted to be limited to states."); *Sinaltrainal* v. *Coca-Cola, Inc.*, 578 F.3d 1252, 1257 (11th Cir. 2009) ("Some acts, such as torture and murder committed in the course of war crimes, violate the law of nations regardless of whether the perpetrator acted under color of law of a foreign nation or only as a private individual."); *Kadic*, 70 F.3d at 243 (noting that "[t]he liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremberg after World War II, and remains today an important aspect of international law") (internal citations omitted).

The Nuremberg Charter demonstrates that the prohibition of war crimes was understood to apply to organizations. Article 9 provides: "At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization." Nuremberg Charter art. 9. In a case trying a member of an organization the Tribunal has deemed criminal, "the criminal nature of the group or organization is considered proved and shall not be questioned." *Id.* art. 10.

The record of the Nuremberg Trials confirms that *corporations* committed war crimes. Control Council Law No. 10 includes "plunder of public or private

property" as a war crime. Control Council Law No. 10 art. 2(b). In the *I.G. Farben* trial, the Tribunal explained that such plunder, whether committed by a natural or juridical person, violates the law of war:

> Where private individuals, *including juristic persons*, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action, not being expressly justified * * * is in violation of international law. * * * Similarly where a private individual *or a juristic person* becomes a party to unlawful confiscation of public or private property by planning and executing a well-defined design to acquire such property permanently, acquisition under such circumstances subsequent to the confiscation constitutes conduct in violation of [the law of war].

Farben Case, at 1135 (emphasis added). The Tribunal then found that "the proof establishes beyond a reasonable doubt that offenses against property as defined in Control Council Law No. 10 were committed by Farben." *Id.* at 1139. It further noted that "[t]he action of Farben and its representatives * * * cannot be differentiated from acts of plunder or pillage committed by officers, soldiers, or public officials of the German Reich." *Ibid.* The Tribunal attributed the act of plunder to Farben itself, not just its representatives.

As detailed further below, *infra* Part VI.B, the Tribunal similarly found that corporations committed

war crimes by exploiting slave labor. *Farben Case*, at 1173-1174. In the Krupp trial,[12] the Tribunal found that "throughout German industry in general, and the firm of Krupp and its subsidiaries in particular, prisoners of war * * * were employed in armament production in violation of the laws and customs of war." *United States* v. *Krupp (Krupp Case)*, 9 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, at 1376 (1950).

In short, the prohibition against war crimes extends to non-state actors, groups, and organizations. As the historical record from Nuremberg shows, juridical entities such as corporations are fully capable of violating the prohibition against war crimes.

VI. THE PROHIBITION OF SLAVERY IS A SPECIFIC, UNIVERSAL, AND OBLIGATORY INTERNATIONAL LAW NORM THAT EXTENDS TO CORPORATIONS.

A. The Slavery Prohibition Is A Specific, Universal, And Obligatory Norm.

International law has long prohibited slavery, which is defined as the exercise of any or all of the

---

[12] Krupp was a corporation from 1903 to December 1943, after which it operated as an unincorporated, privately-owned firm. *United States* v. *Krupp (Krupp Case)*, 9 *Trials of War Criminals Before the Nuernberg Military Tribunals* 1332 (1950). Krupp's use of concentration camp labor began in 1942, when it was still incorporated. *Id.* at 1412.

powers attaching to the right of ownership over a human being. Slavery Convention art. 1, Sept. 25, 1926, 46 Stat. 483, 60 L.N.T.S. 254. The international ban on slavery dates back at least to the Slavery Convention of 1926, which committed state parties to bring about "the complete abolition" of slavery. *Id.* art. 2. Subsequent instruments of international human rights and criminal law unanimously condemn slavery. See, *e.g.*, UDHR art. 4; ICCPR art. 8; Rome Statute art. 7; ICTY Statute art. 5; ICTR Statute art. 3; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, *done* Sept. 7, 1956, 18 U.S.T. 3201, 226 U.N.T.S. 3; U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons (Trafficking Protocol) art. 3, Nov. 15, 2000, 2237 U.N.T.S. 319 (committing states to criminalize trafficking in persons "for the purpose of exploitation," including "slavery or practices similar to slavery").

U.S. courts have recognized that the slavery prohibition is a *jus cogens* norm. *Kadic*, 70 F.3d at 239 (finding that slave trade violates the law of nations "whether undertaken by those acting under the auspices of a state or only as private individuals"); *Comm. of U.S. Citizens Living in Nicar.* v. *Reagan*, 859 F.2d 929, 941 (D.C. Cir. 1988) (noting prohibition of slavery among *jus cogens* norms); see also Restatement § 702(b) ("A state violates international law if, as a matter of state policy, it practices, encourages, or condones * * * slavery or slave trade.").

B. The Slavery Prohibition Extends To Corporations.

The prohibition against slavery applies to private actors, and it is not restricted to natural persons. International human rights treaties refer to the right to be free of slavery as a universal human right irrespective of the perpetrator. See, *e.g.*, ICCPR art. 8 ("No one shall be held in slavery; slavery and the slave-trade *in all their forms* shall be prohibited." (emphasis added)). International criminal law defines the crime of enslavement by the nature of the act, not the identity of the perpetrator. See, *e.g.*, Rome Statute art. 7(2) (defining "enslavement" as "the exercise of any or all of the powers attaching to the right of ownership over a person"). No international legal instrument purports to limit the norm against slavery to any particular class of perpetrator.

On the contrary, international law explicitly contemplates application of the norm to organizations and to groups of non-state actors. Human rights instruments recognize the central role that organized criminal enterprises play in human trafficking – a practice inextricably linked with modern-day slavery – and include those enterprises in their prohibitions. The U.N. Trafficking Protocol, for example, applies to offences that are "transnational in nature *and involve an organized criminal group*." Trafficking Protocol art. 4 (emphasis added); see also ASEAN Declaration Against Trafficking in Persons Particularly Women and Children, Nov. 29, 2004, *available at* http://www.asean.org/16793.htm (committing member states to

"undertake coercive actions/measures against individual[s] *and/or syndicate[s]* engaged in trafficking in persons" (emphasis added)).

The Council of Europe Convention on Action Against Trafficking in Human Beings, May 16, 2005, C.E.T.S. 197, explicitly refers to corporate liability for human trafficking. It includes an article titled "corporate liability," which commits member states to "ensure that a legal person can be held liable for a criminal offence established in accordance with this Convention." *Id.* art. 22. Corporate liability may be "criminal, civil or administrative," depending on the member state's legal systems. *Ibid.*

Indeed, corporate culpability for slavery has been acknowledged since Nuremberg. The trials of corporate officers demonstrate that the tribunal understood the prohibition on slavery to extend to corporate entities. In the Farben trial, for example, the tribunal declared that the corporation *itself* had violated international law:

> Farben * * * utilized involuntary foreign workers in many of its plants. It is enough to say here that the utilization of forced labor, unless done under such circumstances as to relieve the employer of responsibility, constitutes a violation of [international law].

Farben Case, at 1173-1174.

Similarly, in the trial of officers of the Krupp firm, the tribunal implied that the corporation *itself*

was culpable in the exploitation of slave labor at Auschwitz:

> In June 1943, the Krupp firm started to employ concentration camp inmates at Auschwitz. * * * The facts connected with Auschwitz clearly show not only the use of concentration camp labor, but also the desire to do so. They permit no opportunity for the conclusion that this labor was forced upon the Krupp firm.

Krupp Case, at 1415-1416. The tribunal concluded that "it is obvious" that "the employment of these concentration camp inmates was * * * a violation of international law * * *." *Id.* at 1434.

These companies were not criminally prosecuted by the International Military Tribunal; instead the Control Council dissolved them before the trials were initiated. See Control Council Law No. 9, *Providing for the Seizure of Property Owned by I.G. Farbenindustrie and the Control Thereof*, Nov. 30, 1945, *reprinted in* 1 *Enactments and Approved Papers of the Control Council and Coordinating Committee* 225 (1945); General Order No. 3 (Pursuant to Military Government Law No. 52 – Blocking and Control of Property): Firma Friedrich Krupp, *Military Government Gazette, Germany, British Zone of Control*, No. 5, at 62 (1945).

In short, the prohibition of slavery extends not merely to states but also to non-state groups and organizations, including corporations. Regardless of the

remedy sought, the Nuremberg proceedings leave no doubt that corporations are capable of violating the international law prohibition of slavery.

VII. THE PROHIBITION OF PIRACY IS A SPECIFIC, UNIVERSAL, AND OBLIGATORY INTERNATIONAL LAW NORM THAT EXTENDS TO CORPORATIONS.

A. The Piracy Prohibition Is A Specific, Universal, And Obligatory Norm.

Piracy is a long-recognized prohibitory norm of international law from which no derogation is permitted. M. Cherif Bassiouni, *International Crimes*: Jus Cogens *and* Obligatio Erga Omnes, 59 Law & Contemp. Probs. 63, 68 (1996). It is specifically defined as illegal violence, detention, or depredation, committed by the crew or passengers of a private vessel for private purposes, on the high seas or beyond the jurisdiction of any state. Voluntary participation in operating a pirate vessel, or inciting or intentionally facilitating piracy, also violates the norm. United Nations Convention on the Law of the Sea (UNCLOS) art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397.

UNCLOS sets forth the modern legal framework prohibiting piracy, see *id.* arts. 100-107, and 162 states have ratified the treaty. Status of the United Nations Convention on the Law of the Sea, United Nations Treaty Collection (Dec. 13, 2011), http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en

UNCLOS reflects the historical understanding that piracy is both universally wrong and subject to universal jurisdiction. International Law Association, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses* 3 (2000). The treaty thus places an affirmative duty on states to combat piracy, and permits states to exercise jurisdiction over pirate vessels on the high seas or outside the jurisdiction of another state. UNCLOS arts. 100, 105.[13]

This Court has not only acknowledged piracy to be a violation of customary international law but also to be one of the "historical paradigms," which the ATS was enacted to redress. *Sosa*, 542 U.S. at 715, 732; see also *Ali Shafi* v. *Palestinian Auth.*, 642 F.3d 1088, 1096 (D.C. Cir. 2011) ("[T]hat piracy is among the core causes of action contemplated by Congress in enacting the ATS appears beyond dispute * * *.").

For nearly two centuries, this Court has acknowledged piracy to be "an offence against the law of nations, [and] an offence against the universal law of society, a pirate being deemed an enemy of the human race." *United States* v. *Smith*, 18 U.S. (5 Wheat.) 153, 161 (1820). Indeed, "[t]here is scarcely a writer on the law of nations, who does not allude to piracy as a

---

[13] Although not a party to the Convention, the United States has recognized UNCLOS as reflecting customary international law. See, *e.g.*, U.S. Dep't of State, *Digest of United States Practice in International Law* 480 (Elizabeth R. Wilcox ed., 2009).

crime of a settled and determinate nature; and whatever may be the diversity of definitions, in other respects, all writers concur, in holding, that robbery, or forcible depredations upon the sea, *animo furandi*, is piracy." *Ibid.*

Moreover, "in the 18th century, nations reached consensus not only on the substantive principle that acts of piracy were universally wrong but also on the jurisdictional principle that any nation that found a pirate could prosecute him." *Sosa*, 542 U.S. at 762 (Breyer, J., concurring in part and concurring in the judgment); see also Restatement § 404 (universal jurisdiction for piracy).

B. The Piracy Prohibition Extends To Corporations.

The prohibition on piracy applies explicitly to non-state actors. Blackstone described piracy as one of the principal cases constituting "offences against that universal law, committed by *private persons*." 4 William Blackstone, *Commentaries* *73 (emphasis added). "[P]iracy in violation of the law of nations is by definition perpetrated by nonstate actors: 'A pirate is one who roves the sea in an armed vessel without any commission or passport from any prince or sovereign state, solely on his own authority, and for the purpose of seizing by force, and appropriating to himself without discrimination, every vessel he may meet.'" *Ali Shafi*, 642 F.3d at 1096 (quoting *Smith*, 18 U.S. (5 Wheat.) at 163 n.h); see also UNCLOS art.

101 (specifying that piracy is "committed for private ends by the crew or the passengers of a private ship or a private aircraft").

Modern international authorities recognize that non-state groups and organizations can and do violate the norm prohibiting piracy. The U.N. Monitoring Group on Somalia "considers Somali-based piracy to be a fundamentally criminal activity attributable to specific militia groups and 'families,'" *Rep. of the Monitoring Group on Somalia Pursuant to Security Council Resolution 1853 (2008)*, Security Council, ¶ 130, U.N. Doc. S/2010/91 (Mar. 10, 2010) (Rep. of the Monitoring Group), and it has described in detail the structure of pirate networks and militias that often consist of hundreds of pirates. *Id.* ¶¶ 131-140.

Moreover, the U.N. Security Council has explicitly stated that "individuals and entities who incite or intentionally facilitate an act of piracy are themselves engaging in piracy as defined under international law." S.C. Res. 1976 ¶ 8, U.N. Doc. S/RES/1976 (Apr. 11, 2011). The Monitoring Group has observed that pirate networks and militias already follow a typical "business model," Rep. of the Monitoring Group, annex III, that approximates a limited partnership such that "[t]he possibility of pirates operating through the corporate form is not far-fetched," *Kiobel*, 621 F.3d at 156 n.10 (Leval, J., concurring in the judgment).

In short, the prohibition of piracy extends to non-state actors and organizations. Corporations are

properly among those parties who are capable of violating the international prohibition of piracy.

* * *

As petitioners have shown, corporations and other organizations are not categorically incapable of violating international law. This brief has further demonstrated on a norm-by-norm basis that corporations and other organizations are specifically capable of violating many of the major prohibitory norms of international law that serve as a basis for actions under the ATS and TVPA, including the norms that are at issue in both the *Kiobel* and *Mohamad* cases.

CONCLUSION

Accordingly, the judgments of the courts of appeals should be reversed.

Respectfully submitted.

JEFFREY A. MEYER
127 Wall Street
New Haven, CT 06511
(203) 436-3918

OONA A. HATHAWAY
Counsel of Record
127 Wall Street
New Haven, CT 06511
(203) 436-8969
oona.hathaway@yale.edu

Counsel for Amicus Curiae

DECEMBER 2011